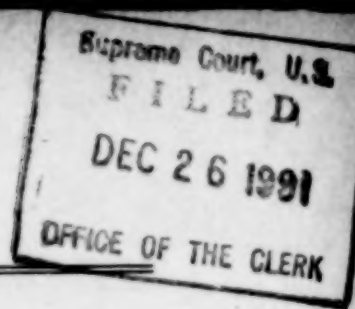


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No. 91-126



In The  
**Supreme Court of the United States**  
October Term, 1991

— ♦ —  
HOWARD WYATT,

*Petitioner,*

vs.

BILL COLE and JOHN ROBBINS, II,

*Respondents.*

— ♦ —  
On Writ Of Certiorari To The  
United States Court Of Appeals  
For The Fifth Circuit  
— ♦ —

BRIEF OF RESPONDENT  
— ♦ —

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## QUESTIONS PRESENTED

1. Whether private parties found to be joint participants in state action are entitled to qualified immunity?
2. Whether the *Harlow* objective test for determining the application of qualified immunity to public officials is the appropriate test in the private party context?
3. Whether the lower courts correctly applied qualified immunity in the circumstances of this case?

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On Writ Of Certiorari To The  
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For The Fifth Circuit

BRIEF OF RESPONDENT

## OPINIONS BELOW

The United States District Court opinion holding the Mississippi replevin under bond statute unconstitutional appears at 710 F. Supp. 180 and is at Joint Appendix ("J.A.") at 3-9. The unreported decision of that Court which holds that the individual defendants are entitled to qualified immunity is reprinted at J.A. 10-19. The United States Court of Appeals for the Fifth Circuit opinion, which holds that the private defendants are entitled to qualified immunity, appears at 928 F.2d 718, and is in the Appendix to the Petition for Writ of Certiorari ("Pet.App.") 13a-37a.



## JURISDICTION

Judgment was entered by the United States Court of Appeals for the Fifth Circuit on April 17, 1991. The Petition for Writ of Certiorari was filed July 16, 1991 and granted October 7, 1991. This Court has jurisdiction under 28 U.S.C. § 1254(1).

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## STATUTE INVOLVED

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

---

## STATEMENT OF THE CASE

Howard Wyatt, the Petitioner, and one of the Respondents, Bill Cole, were partners in the cattle business. Pet.App. 19a. A disagreement arose between the two which precipitated the break up of the partnership. Cole sought the services of Respondent, John Robbins, II, an attorney in Brandon, Mississippi. Pet.App. 19a. Robbins filed a Complaint in the Simpson County, Mississippi Circuit Court accompanied by a replevin bond in the

amount of \$18,000. The circuit Judge issued a writ of replevin according to Mississippi Code § 11-37-101 which had undergone major revisions in 1975, and which had not been invalidated by any reported decision. The Sheriff of Simpson County, Mississippi executed the writ in July of 1986. At that time, twenty-four head of cattle, a tractor, and tractor parts were seized.

The writ and a summons were served on Wyatt the next day following the seizure. In October 1986 an order was entered continuing the bond, but dismissing the writ of replevin at the cost of Wyatt. Cole was ordered to return the seized property to Wyatt, or if the property was not available to pay damages to Wyatt along with any damages for wrongful suing out of the writ of replevin. J.A. 4. This circuit court action was dismissed without prejudice although Wyatt had not yet received the seized property. *Id.*

Wyatt chose to file this action in the United States District Court for the Southern District of Mississippi, rather than to pursue his remedy for wrongful suing out of the replevin in state court. Wyatt's complaint was based on a claim that § 11-37-101 denied him due process. Wyatt sought injunctive relief and damages against Cole and Robbins, the Sheriff and his assistants, Simpson County, Mississippi, and the State of Mississippi (for whom the Attorney General of the State of Mississippi was later substituted).

The district court entered a memorandum opinion and order, 710 F. Supp. 180 (S.D. Miss. 1989) holding that § 11-37-101 Miss. Code, violated the due process clause. The specific infirmity identified by the court was that

once a plaintiff presented the statutory form, under Miss. Code Ann. § 11-37-3, the judge had no discretion to deny the writ.

On August 10, 1989, the district court entered a second, unpublished memorandum opinion. The court found that Cole and Robbins were entitled to qualified immunity for any damage that may have occurred prior to the declaration of unconstitutionality of the statute. The court held that the qualified immunity did not apply to any acts done following the declaration of the statute's unconstitutionality and a trial was had on the sole issue of damages which would have accrued after that date. Wyatt conceded at trial that he had no provable damages after that date. Wyatt's only claim of damages consisted of deterioration of the cattle as a result of the seizure, and mental distress resulting from having had his property seized.

Petitioner appealed to the Fifth Circuit Court of Appeals which affirmed the district court's findings and also held that the private defendants would not be liable for Wyatt's attorney's fees. *Wyatt v. Cole*, 928 F.2d 718 (5th Cir. 1991).

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### SUMMARY OF THE ARGUMENT

Private parties who reasonably rely on state statutes or the conduct of state officials should be entitled to a qualified immunity when the statute or the conduct is subsequently declared unconstitutional. Qualified immunity for private parties based on a reasonable reliance is

grounded in compelling public policy. The *Harlow* objective standard can be used to determine when to apply the qualified immunity in the private context. The lower courts in our case properly applied qualified immunity to Cole and Robbins, and correctly determined that their reliance on the Mississippi replevin statute was reasonable.

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### ARGUMENT

#### I. QUALIFIED IMMUNITY FOR PRIVATE PERSONS FOUND TO BE JOINT PARTICIPANTS IN STATE ACTION IS THE NECESSARY RESPONSE TO THE POST-LUGAR EXPANSION OF LIABILITY FOR SECTION 1983 VIOLATIONS.<sup>1</sup>

*Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982), announced a two-pronged test which reformulated the joint participant/state action doctrine.<sup>2</sup> This reformulation places all post *Lugar* Section 1983 private defendants in the same category, whether their acts of constitutional violation, were in good or bad faith. Since *Lugar*, some public officer defendants who were actually responsible

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<sup>1</sup> See 42 U.S.C. § 1983. For an excellent analysis of application of qualified immunity to private defendants, see *Note, Private Party Immunities to Section 1983 Suits*, 57 U. Chi. L. Rev. 1323.

<sup>2</sup> The first prong of the *Lugar* test addressed the "state act" triggered by the private defendant which would include all violations of constitutional rights by the state regardless of the public officer's motivations. Then by simply requiring that the private individual need only act together with or obtain "significant aid" from public officials, the second prong lowered the actionable threshold by removing the conspiracy requirement of previous decisions.

for the execution of a violation may escape liability by claiming official immunity while the private defendant is made to pay for placing faith in state law or the conduct of governmental officials. See *F.E. Trotter, Inc. v. Watkins*, 869 F.2d 1312 (9th Cir. 1989) (private contractor following Navy guidelines to prepare land survey held liable while Navy defendants were afforded qualified immunity).

The *Lugar* Court was aware of the potential anomaly when it announced the expansion of Section 1983 liability into conduct traditionally considered private. Justice Powell cautioned "that private individuals who innocently make use of seemingly valid state laws would be responsible, if the law is subsequently held to be unconstitutional, for the consequences of their actions." *Lugar*, 457 U.S. at 499 n. 23.

However, the *Lugar* Court reasoned that changing the "character of the cause of action" was not the solution to this particular predicament. *Id.* Rather, the Court suggested that this problem might best be resolved through the extension of a "good faith" defense or a qualified immunity. *Id.* The Court did not "reach the availability of such a defense at this juncture." *Id.*

Our case presents this Court with the opportunity to make that decision. Logic demands the extension of some form of protection to private individuals acting with reasonable reliance on presumably valid statutes or placing faith in a public official's conduct. To impose liability upon this category of private party and then to deny them the same qualified immunity offered state officials, is neither logical nor just.

On occasion, this Court has justified the application of immunity to public officials by looking to the common law existing at the time of the passage of the Civil Rights Act of 1871, in addition to considering present public policy. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 259 (1981). Wyatt relies heavily on such historical analysis, and some circuits have similarly overemphasized the requirement of historical justification while down playing policy inquiries.<sup>3</sup>

Those circuits which have recognized such immunity have perhaps strained to incorporate the good faith defenses at common law in 1871 to today's circumstances simply to meet the "historical inquiry requirement." In the context of post-*Lugar* private defendants the historical analysis should be eliminated.

**A. The historical inquiry into private party immunity of 1871 is of little value in addressing issues of private party immunity in today's context.**

A problem with the historical inquiry, heavily relied upon by Wyatt in our case, is this Court's non-uniform

<sup>3</sup> The First Circuit rejected an analogy to the good faith defense of malicious prosecution found at common law. *Downs v. Sawtelle*, 574 F.2d 1 (1st Cir. 1978). The Sixth Circuit rejected qualified immunity for private individuals but recognized a good faith defense as distinguished from an immunity, in *Duncan v. Peck*, 844 F.2d 1261 (6th Cir. 1988). The Ninth Circuit initially stated that "there is no good faith immunity under Section 1983 for private parties," but in a later opinion, appeared to retreat from the position. Compare *Howerton v. Gabica*, 708 F.2d 380 (9th Cir. 1983) with *Thorne v. City of El Segundo*, 802 F.2d 1131, 1140 n.8 (9th Cir. 1986).



use of that inquiry to Section 1983 liability and immunities. The Court expanded Section 1983 liability far beyond that envisioned by its authors without any historical analysis, on the one hand, while limiting the justification of immunity to a historical inquiry into common law of 1871, on the other hand.

Since public officials enjoyed certain immunities at common law, this inconsistency has had little bearing on the Court's analytical means used to justify the end of granting immunities to governmental officials. However, private parties of that period were not similarly situated with public officials. Therefore, a different analysis is required.

**1. At common law in 1871 private parties had no need of immunity.**

No cause of action against a private actor for the deprivation of a constitutional right existed at common law; hence, no immunity was needed. Therefore, to rely on an inquiry into the common law of 1871 to gain insight into situations where immunity should be applied today is ineffectual, given that private parties were not considered state actors for another century. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970) (this Court's first recognition of the joint participation doctrine).

Additionally, this Court should take into consideration the evolution of its analysis used to support varying degrees of immunity for individual conduct of a public official. As the Court expanded the circle of potential defendants, it has de-emphasized and, indeed practically,

eliminated its reliance on the historical foundations of immunity. *Anderson v. Creighton*, 483 U.S. 635, 645 (1987).

**2. The Supreme Court has eliminated the individual historical inquiry in more recent cases.**

Justice Scalia wrote in *Anderson*, "we have never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law." *Id.* at 645. Moreover, Justice Scalia stated that "such a notion is plainly contradicted by *Harlow*, where the Court completely reformulated qualified immunity along principles *not at all embodied in the common law*". *Id.* (emphasis added). According to Justice Scalia, the general principle of qualified immunity that *Harlow* established would be applied "across the board." *Id.* (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 815-820 (1982)).

If this Court needs a historical foundation for the granting of qualified immunity to those private persons converted to state actors, it can adapt the common law analysis made by most circuits which have found granting private party immunities appropriate.

**3. The common law good-faith defense to malicious prosecution and wrongful attachment claims can be fairly analogized to qualified immunity in the private party context.**

At common law in 1871 a person was not liable under the tort of malicious prosecution, wrongful attachment,

or abuse of process unless he commenced the attachment with malice and without probable cause. See generally W. Prosser, *Handbook of the Law of Torts*, § 120 (4th ed. 1971). In making these analogies several circuits acknowledged that these defenses were not technically immunities. *Jones v. Preuit & Mauldin*, 808 F.2d 1435, 1440-1443 (11th Cir. 1987) *aff'd on rehearing*, 851 F.2d 1321 (11th Cir. 1988); *Folsom Inv. Co., Inc. v. Moore*, 681 F.2d 1032, 1037-38 (5th Cir. 1982). However, as this Court stated in *Monroe v. Pape*, 365 U.S. 167, 187 (1961), Section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."

With this perspective, this Court in *Pierson v. Ray*, 386 U.S. 547 (1967), granted police officers immunity under Section 1983 when they arrested someone under a presumably valid statute which they relied upon in good faith, but which was later declared unconstitutional. The rationale was that common law immunity was granted to police officers whose arrests were false or resulted in false imprisonment but were made in good faith and with probable cause. See also *Wood v. Strickland*, 420 U.S. 308, 318-19 (1975) (public school officials liable under state tort law for malicious acts established good faith immunity under Section 1983).

The Fifth, Eighth, and Eleventh Circuits simply followed this Court's reasoning when they found that the availability of similar defenses in actions for malicious prosecution and wrongful attachments supported the historical precedent for recognizing qualified immunity in the private context. See *Folsom* 681 F.2d at 1037-38 (common law defense of malicious prosecution grounded in

same type of public policy - citizen should not be penalized for resorting to courts in good faith); *Buller v. Buechler*, 706 F.2d 844, 850-853 (8th Cir. 1983) (adopted *Folsom* analysis); *Jones* 808 F.2d at 1440-1443 (maintained that Supreme Court use of good faith defense at common law to justify immunity in *Wood v. Strickland* transferred to private context); see also *DeVargas v. Mason & Hanger-Silas Mason Co., Inc.*, 844 F.2d 714 (10th Cir. 1988) (court did not address common law analysis but cited above mentioned decisions).<sup>4</sup>

Whether the historical analysis is made by way of analogy to the malicious prosecution good faith defense at common law (in spite of its shortcomings), or not made at all, the policy inquiry approach is more instructive in determining the entitlement of qualified immunity in today's circumstances and does not run afoul of this Court's extension of immunity to public officials.

#### **B. Compelling public policies call for the grant of qualified immunity to post-Lugar private defendants.**

Powerful policy considerations support the granting of qualified immunity to private individuals such as Cole and Robbins. The Eleventh Circuit best described these policies in the following:

When a citizen undertakes in good faith to utilize a proceeding at law provided by his state legislature, he should do so with confidence that

<sup>4</sup> See *infra* note 3 for discussion on opposing circuits.

he need not fear liability resulting from the legislatures's constitutional error of which he was unaware. Indeed, our system encourages citizens to employ existing lawful mechanisms to resolve their claims and disputes. *What we encourage we ought not seek to punish.* In the same way we wish to encourage citizens to undertake public service, so must we encourage them to settle their differences and assert their claims right through the employment of legal mechanisms which they believe, in good faith, are constitutional.

*Jones*, 851 F.2d at 1325 (emphasis added) (this case addressed the issue of immunity with respect to presumptively valid attachment statutes which is sufficiently applicable to our case involving a presumptively valid replevin statute).

Although the objectives of the policies underlying the grant of qualified immunity to government officials are not identical to the objectives stated in the policies discussed above, they are analogous, in that they do take aim at a similar target.

**1. Public policies supporting private party qualified immunity are analogous to those policies underlying qualified immunity for government officials.**

The average citizen should be able to rely on presumptively valid state statutes or authorities to vindicate his or her rights or fulfill his or her obligations just as the public officers need to be able to conduct their duties without the threat of interfering liability. For example, the

Ninth Circuit denied qualified immunity to landlord defendant in *Howerton v. Gabica*, where a police officer accompanied the landlord when serving valid eviction notices. 708 F.2d 380. Presumably, the landlords had a legal right to call the police officers to their aid in the eviction procedure. *Id.*

In *F.E. Trotter, Inc. v. Watkins*, immunity was refused to a private contractor who was sued for actions he took which were necessary to fulfill a land survey contract with the Navy. 869 F.2d 1312. In other words, the private contractor was under a *legal obligation* to act in a way that resulted in a constitutional violation for which he was held liable. He potentially faced a breach of contract claim if he failed to comply. *Id.*; compare *DeVargas*, 844 F.2d at 721, 722 (court found immunity necessary where governmental authority involved required private defendants to act as they did or likely be liable for breach of contract).

Without the protection of qualified immunity, private parties may be encouraged to resort to less desirable methods of self help. *Jones*, 851 F.2d at 1325. In *Lugar*, the Court suggested that private parties have a right "to rely on some state rule governing their interactions with the community surrounding them." *Lugar*, 451 U.S. at 937.

The state and not the private parties, should be liable for unconstitutional laws or unconstitutional official conduct, upon which the private person relies in good faith. Wyatt seeks here to recover from Cole and Robbins for what he cannot recover from the Mississippi legislature nor its attorney general.



To hold private citizens who act with reasonable reliance accountable while shielding the legislative and executive branches of government is to engender disrespect for the law. As the Fifth Circuit aptly stated in *Folsom*, to subject a private party "to constitutional tort damages for invoking in good faith presumptively valid legislation later held to be unconstitutional would be to visit the effects of unconstitutional action by the legislature on innocent citizens." 681 F.2d at 1037. The Eleventh Circuit statement bears repeating: "[w]hat we encourage we ought not seek to punish." *Jones*, 851 F.2d at 1325.

This Court has protected the government from liability for private conduct that it did not initiate and as noted in *Lugar*, the Court "avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." *Lugar*, 457 U.S. at 936. To fail to accord private persons with similar protection would not only ignore logic but undermine the private person's faith in the legal system.

These policy considerations provide this Court with a logical and fair basis for recognizing qualified immunity in the private context. Additionally, the end results of these means will not disturb the Court's previous holdings.

**2. Policy considerations for granting private party qualified immunity are consistent with this Court's reformulation of public official immunity.**

In *Dennis v. Sparks*, 449 U.S. 24 (1980), this Court denied private party immunity to those "private persons

who corruptly conspired with the judge". Nevertheless, entitling private defendants to qualified immunity who act with reasonable reliance will not disturb the *Dennis* holding. Private actors guilty of bad faith such as "conspiring with a judge" to deprive a party of his rights will not be entitled to immunity under the standards discussed in Section II.<sup>5</sup>

However, even though the holding in *Dennis* can be maintained, the Court relied on a historical analysis that, of course, revealed nothing at common law that would afford private persons immunity who corruptly conspired with judges. On the facts of *Dennis*, the end result may have been justified, but the means by which it was reached offer little to post-*Lugar* private defendants who do not "corruptly conspire" but act in good faith reliance.

Assuming that private actors who act with reasonable reliance are entitled to qualified immunity, the next issue is the standard to be applied.

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**II. THE OBJECTIVE STANDARD FORMULATED IN *HARLOW v. FITZGERALD* EFFECTIVELY TRANSLATES INTO THE PRIVATE PARTY IMMUNITY APPLICATION.**

In *Harlow v. Fitzgerald*, this Court adopted a purely objective test by which to judge whether a governmental official is entitled to qualified immunity. 457 U.S. 800

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<sup>5</sup> *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), would also be undisturbed since that case involved a conspiracy element.



(1982). The defense of qualified immunity shields a state official from liability in a Section 1983 action when the officials' "conduct does not violate a clearly established statutory or constitutional right of which a reasonable person would have then known." *Harlow*, 457 U.S. at 818. The test is a two part inquiry: (1) whether the rights which were violated were clearly established; and (2) whether the reasonable person would have known of the violation.

As this Court maintained in *Harlow*, "reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law . . . [would] permit the resolution of many . . . claims on summary judgment." *Id.* Therefore, a trial court may answer the two inquiries as a matter of law at the summary judgment level.

The *Harlow* test transfers smoothly to the private defendant context. The actions of the private defendant who relies on state statutes or who places faith in the conduct of governmental officials can be judged by the same objective standard set out in *Harlow*.

The Sixth Circuit is too narrow in its analysis in *Duncan v. Peck*, where the Court views the use of the *Harlow* test by those circuits granting immunity in the private context as distorted. That court perceived the use of a subjective element in those cases because of those circuits' comparisons to the common law actions of malicious prosecution. *Duncan*, 844 F.2d at 1267.

The cause of malicious prosecution required a determination of the defendant's state of mind since intent or

conspiracy was generally involved. However, as discussed earlier, those circuits using the comparison to this common law action did so by analogy and not by mirror image adoption. The rationale of the good faith defense at common law gives rise to the rationale in support of good faith qualified immunity. The standard by which either is judged does not affect the purpose of the existence of the defense or the immunity.

Furthermore, that some circumstances may require more intensive fact examination does not mean that an objective test cannot be applied. In *Anderson*, this Court reasoned that a court must look at a qualified immunity claim in the context of the particular facts of the case. *Anderson*, 483 U.S. at 641. The Court concluded that "[t]he relevant question of [the] case . . . is the objective (albeit fact-specific) question of whether a reasonable officer could have believed [the] warrantless search to be lawful. . . ." *Id.*

Likewise, when examining the private conduct the courts must look to the facts of the case. The record may include evidence that the defendants actually knew of the constitutional problem. However, as the district court stated in this case, whether the infirmity of the statute was obvious, meaning that Cole and Robbins knew of its infirmity, was not a material fact. J.A. 13. The determination was whether a reasonable person under the same circumstances could have determined the infirmity.

Some private defendants should be held to a higher standard of knowledge. Utilizing the objective standard set out in *Harlow*, not unlike establishing standards of care in negligence cases, courts can make determinations

on a case by case basis regarding the extent to which the private defendant should have knowledge of the law.<sup>6</sup>

One of the reasons this Court eliminated the subjective element from the test used prior to *Harlow* was to encourage the resolution of insubstantial claims at the summary judgment level which would avoid undue disruption of governmental activities. *Id.* In the private context this rationale still holds true. However, rather than preventing the disruption of government, the analogy in the private context is that judicial economy is promoted, notwithstanding the other important public policies already stated.

**A. The objective nature of the *Harlow* test affords private defendants the same procedural benefits as public officers, thereby promoting judicial economy.**

Applying qualified immunity in the private context judged by the objective standard in *Harlow*, would allow courts to limit discovery since the particular private defendant's subjective state of mind – whether he actually knew that his conduct violated a clearly established constitutional right – is not a material fact in all but

<sup>6</sup> For example, an officer of the state may be held to a higher degree of knowledge of law than that of a private person; or a business that consults regularly with an attorney may have a higher standard than the business that has little or no legal advice. Even an attorney, such as Robbins, may be held to the higher standard as compared to the layperson. The objective nature of the test allows the courts to deal with these situations individually.

exceptional cases. Similarly, summary judgment decisions on the immunity issues are facilitated, as well as early disposal of frivolous lawsuits. Also, immediate appeal is available to the private defendant. Disposal of litigation at these early stages not only conserves the time and energies of the judicial system but also aids in limiting the legal expense for the private party who does not have at his disposal the resources of the attorney general's office.

Finally, this Court reasoned that "the public interest in deterrence of unlawful conduct and in compensation of victims remain[ed] protected by a test that focuses on the objective legal reasonableness of an official's acts", *Harlow*, 457 U.S. at 819. This is because the conduct of public officials that falls outside the reasonable standard would fail the objective test, and liability would attach. *Id.* Providing qualified immunity to private actors as judged by the objective standard also promotes the dual purposes of Section 1983 for the same reasons.

**B. The deterrence and compensation goals of Section 1983 are achieved with the application of qualified immunity in the private party context since bad faith violations will not escape liability under the objective test.**

*Lugar*, in effect, transformed a prima facie pleading requirement of "bad faith" into an affirmative defense of "good faith." After *Lugar*, both good faith and bad faith conduct are lumped together. Utilizing the objective standard with private defendants to implement qualified

immunity creates a mechanism for sorting these two categories by providing the innocent defendant with protection.

In the private context, the necessary balancing between the need to defer constitutional deprivations and to compensate victims when that deterrence fails is preserved for the same reasons stated in *Harlow*. Liability will attach for corrupt or conspiratorial conduct,<sup>7</sup> e.g. "bad faith," since such conduct would fail the objective test – where private persons reasonably should have known that their reliance on state statutes or authorities would violate clearly established law.<sup>8</sup>

As the Eleventh Circuit reasoned, "no additional deterrence can be achieved by punishing individuals who could not reasonably have known that their actions were improper." *Jones*, 851 F.2d at 1325. In light of this Court's comparable reasoning in *Harlow*, the objectives of Section 1983, deterrence and compensation, are met with the application of qualified immunity in the private party context.

<sup>7</sup> See *supra* note 5 and corresponding discussion in text.

<sup>8</sup> The objective standard would effectively deal with concerns as expressed by the First Circuit when the court implied that granting immunity to private persons, especially those acting to maximize profit or to gain personally would encourage the deprivation of constitutional rights. See *Lovell v. One Bancorp*, 878 F.2d 10 (1st Cir. 1989). In situations like those, actors would escape liability only if they could show that a reasonable person could not have acted otherwise.

### III. THE DISTRICT COURT AND THE FIFTH CIRCUIT COURT OF APPEALS PROPERLY APPLIED QUALIFIED IMMUNITY TO THE PRIVATE PARTIES IN OUR CASE.

A proper application of qualified immunity in this case requires that its grant be grounded on compelling public policy. Furthermore, the court must judge the private defendant's actions under the "reasonable person" objective standard to determine the entitlement to qualified immunity.

In evaluating the actions of Cole and Robbins, the district court denied the plaintiff's motion for summary judgment on the issue of liability for damages resulting from defendants actions prior to the statute being held unconstitutional. The court held that Cole and Robbins as private defendants were entitled to a good faith or qualified immunity based on the holding of the Fifth Circuit in *Folsom*, as well as the district court's reliance on the *Harlow* decision. Furthermore, the court applied the *Harlow* test to the Defendants' conduct. The Fifth Circuit's affirmation was proper because:

#### A. The lower courts made the appropriate historical and policy inquiries to establish support for their application of qualified immunity in this case.

The district court relied on the rationale used by the Fifth Circuit in *Folsom* to support its grant of qualified immunity. *Folsom* involved a Section 1983 action for monetary damages for alleged wrongful and unconstitutional attachment of 200 acres of real estate which is



similar enough to the Mississippi replevin statute to be applicable. *Folsom*, 681 F.2d 1032. In that case the Fifth Circuit based its conclusion to grant immunity upon a thorough policy and historical analysis. In *Wyatt v. Cole*, 928 F.2d 718 (5th Cir. 1991)(*per curiam*), the Fifth Circuit incorporated its inquiries made in *Folsom*.

The court's policy considerations for granting immunity to Cole and Robbins are as follows:

[T]he private party is entitled to an immunity because of the important public interest in permitting ordinary citizens to rely on presumptively valid state laws, in shielding citizens from monetary damages when they reasonably resort to a legal process later held to be unconstitutional, and in protecting a private citizen from liability when his role in any unconstitutional action is marginal.

*Folsom*, 681 F. at 1037. As summarily stated in *Wyatt*, the court held that citizens acting in good faith should be allowed the sanctuary of the law. 928 F.2d at 821.

The Fifth Circuit also addressed the historical approach to immunities at common law. The court did not regard the lack of common law immunity as a barrier to the creation of qualified immunity in the private party context. *Folsom*, 681 F.2d at 1037 (making reference to *Owen v. City of Independence*, 445 U.S. 622 (1980)).<sup>9</sup> In other words, the Fifth Circuit reasoned that "compelling public

<sup>9</sup> In *Owen* this Court held that since there was not history of immunity for municipal corporations extant at the time of § 1983's passage and since there is no public policy support today for such an immunity, none would be implied.

policies [were sufficient justifications] for an immunity in protecting a private citizen who in good faith invokes a presumptively valid state attachment statute." *Id.* at 1038. Moreover, "such a citizen, although not immunized *per se*, would not have been subject to tort liability prior to the passage of Section 1983." *Id.*

Nonetheless, the court analogized the pre - Section 1983 action of malicious prosecution and its defense based upon probable cause to today's application of qualified immunity to the private defendant. The court noted that this "defense was not the same as an immunity, but was grounded in many of the same types of public policy justification supporting [an immunity in the private context]." *Id.* at 1038. The court further reasoned that "the existence of a probable cause defense at common law convinces us that Congress in enacting § 1983 could not have intended to subject to liability those who in good faith resorted to legal process." *Id.* A common law defense extant at the time of § 1983's passage has been transformed into an immunity." *Id.*

The Fifth Circuit followed the analytical pattern which evolved through the Supreme Court's application of immunities in the public official context and through the application of immunity in the private context in other circuits. Given the careful attentions that the Fifth Circuit gave to both policy and the historical inquiries in its analysis, this Court should follow the Fifth Circuit's reasoning under its own independent review.<sup>10</sup>

<sup>10</sup> Because this appeal reaches this Court from summary judgment below, as an appellate court this Court must apply

(Continued on following page)



- B. The lower courts applied the *Harlow* objective test to the facts of our case and properly held that Cole and Robbins' reliance on the validity of the Mississippi replevin statute was reasonable.**

Here, the district court followed the Fifth Circuit's lead in *Folsom*. The court maintained that the federal test for qualified immunity as set forth in *Harlow* is identical for both private individuals and for state officials performing discretionary functions. *Folsom*, 681 F.2d at 1032.

In determining the reasonableness of Cole and Robbins' actions, the lower courts considered the history of the Mississippi replevin statute, Miss. Code Ann. § 11-37-101; its predecessor statutes, and evidence regarding the actual conduct of Cole and Robbins. J.A. 13. The district court, as did the Fifth Circuit under its *de novo* review, decided that given the fluctuation of the law, Cole and Robbins' reliance on the statute was inherently reasonable and sincere.

There was no reported decision, either state or federal, that held the Mississippi statutory procedure used

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the same substantive test and rules for the propriety of summary judgment as did the district court in ruling on the motion and the court of appeals in affirming such. That is, this Court "must determine whether the record as it stands reveals any disputed issue of material fact, assume the resolution of any such issue in favor to the non-movant, and determine whether the movant is then entitled to judgment as a matter of law." Fed. R. Civ. P. 5; *First Jersey Nat. Bank v. Dome Petroleum Ltd.*, 723 F.2d 335, 338 (3rd Cir. 1983). As a question of law, the standard of review is *de novo*.

by Cole and Robbins to be unconstitutional. Prior to this time, the Supreme Court of the United States had addressed the constitutionality of a number of state property recovery statutes addressed in the discussion below. However, in view of the state of flux of the law, it cannot be said that the use of the Mississippi replevin statute violated a *clearly* established constitutional right of Wyatt.

In *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974), the plaintiff attacked the constitutionality of Louisiana's sequestration statutes based on the statutes' failure to provide a pre-seizure hearing. Mitchell relied upon the long line of cases of this Court, culminating in *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337 (1969) and *Fuentes v. Shevin*, 407 U.S. 67 (1972). *Mitchell*, 416 U.S. 600. This Court noted that the holdings in those cases were not as clear as petitioner would have it. The Court found the Louisiana statute constitutional because it provided for "an immediate hearing and dissolution of the writ unless the plaintiff could prove the grounds upon which the writ was issued." *Id.* at 618.

The Louisiana sequestration statutes, by no means stand in stark contrast to the Mississippi replevin statute utilized by Cole and Robbins. The Louisiana statutes required that the clerk issue the writ upon presentation of an affidavit stating the nature of the claim and the amount and the grounds relied upon by the plaintiff. The defendant could dissolve the writ by contradictory motion, or could obtain release of the property by posting security for it. La. Code Civ. Proc. Ann. Art. 3501, 3506. This Court found significance in the fact that Louisiana law provided for an immediate hearing and dissolution of the writ.

In similar fashion, the Mississippi replevin statute, as it existed in 1987, provided for issuance of the writ by a judge (as opposed to a clerk) upon execution of a statutory affidavit by the plaintiff. The statute required specific allegations including: 1) a description of the property; 2) the facts and circumstances upon which the plaintiff relies for his claim including the attachment of any documents supporting the claim of wrongful possession; and 3) the attachment of any supporting documents. 1975 Miss. Laws Ch. 508.

In addition, the statute called for the posting of a bond by the plaintiff. As a procedural safeguard, the defendant could post a bond within two days from seizure of the property and the property would be restored to him pending final judgment. The law provided that all replevin actions were to be treated as "preference cases" to reach "an early determination as to the rights of the parties. . . ." 1975 Miss. Laws Ch. 508, § 23. The pre-1975 version of the statute had provided for issuance by the clerk of the court and made no provisions for expedited hearings. Miss. Code Ann. § 11-37-1 *et seq.* (1972).

As the district court stated in its initial opinion, although the Supreme Court had declared unconstitutional statutes which allowed seizures which were ordered by a court clerk without a hearing, they did not "prevent prejudgment seizures in every instance." J.A. 6. The court further noted in its findings that the Mississippi statute was similar to the Louisiana statute upheld in *Mitchell*. J.A. 6-7.

The 1975 version of the Mississippi replevin statutes had been enacted following this court's decisions in

*Sniadach, Fuentes and Mitchell*. This fact, coupled with the other extenuating circumstances surrounding the Mississippi statute, supported the courts' holdings that Cole and Robbins' reliance upon the statute was reasonable.

Furthermore, in this case the Fifth Circuit went on to reason that although the statutory scheme [§ 11-37-101] was in legal jeopardy, "Cole and Robbins acted with the assistance of government officials who were giving full force and effect to the statutory procedure." *Wyatt* 928 F.2d at 821 The Court's position was that the presence of these officials in this context of the use of the statute "contributed to the reasonableness of the private actors' conformity to statutory procedure." *Id.*

In the end the Fifth Circuit's holding of reasonableness in these circumstances rested on the premise of political accountability. It is the government who should bear the responsibility for its laws in cases like ours. As the Fifth Circuit described:

The first line of responsibility rests with the legislative body enacting the statute. The next line of responsibility rests with the enforcing officials. When the legislature has not repealed, and executive and judicial officials are still enforcing a statute, it is not unreasonable for private actors to fail to quickly comprehend a developing body of doctrine that portends trouble for its constitutionality.

*Id.*

Having addressed both policy and historical considerations adequately, the analysis of the lower courts in our case was complete. Both courts' determination of the

reasonableness of the defendants' conduct under the circumstances of our case as judged by the *Harlow* standard was accurate. If this Court adopts the doctrine of qualified immunity for post-*Lugar* private defendants, as it should, then the decisions of the lower courts in our case should stand as ordered.

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CONCLUSION

The district court's grant of partial summary judgment to defendants Cole and Robbins on the issue of entitlement to qualified immunity against any damages that occurred prior to declaration of the unconstitutionality of Miss. Code Ann. § 11-37-101 and the Fifth Circuit Court of Appeals' affirmation of this holding was proper and should be affirmed by this Court.

Respectfully submitted,  
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